Applicant : Herbert Howell Waddell
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Remarks

This communication is in response to the August 28, 2003 Final Office Action, but an earlier Final Office Action was issued on February 12, 2002. In response to that, a Notice of Appeal was filed and an Appeal Brief was filed on October 20, 2002. Then on January 6, 2003, without notice that the Final Action was withdrawn, an Office Action was issued rejecting all claims on different grounds than in the Final Office Action.

In the January 9, 2003 Office Action, the Examiner to whom this application is assigned rejected all of Applicant's claims. On January 31, 2003 Applicant filed a response to the January 9, 2003 Office Action. In the August 28, 2003 Office Action issued by the United States Patent and Trademark Office, the Examiner rejected all of Applicant's claims by citing new grounds of rejection and declared the action Final. On October 15, 2003, the Applicant filed a Communication in response to the August 28, 2003 Final Office Action traversing the Examiner's objections and/or rejections. On November 14, 2003, the Examiner issued an Advisory Action stating that the October 15, 2003 Communication will not be entered without responding to any of the Applicant's grounds for traversing Examiner's rejections and/or objections.

On January 9, 2003, the Examiner issued an Office Action and stated that "Claims 1-15 are rejected under 35 U.S.C. §103(a) as being unpatentable over Davis (318,359) in view of Decker (4,793,645). Immediately after stating the rejection, the Examiner referred to Jones, which was not published when the subject application was filed.

On January 31, 2003, Applicant filed a response traversing the

Examiner's rejections and/or objections.

On August 28, 2003, the Examiner issued a Final Office Action and stated that "Claims 1-15 are rejected under 35 U.S.C. §103(a) as being unpatentable over Davis (318,359) in view of Decker (4,793,645). The examiner again referred to Jones. Moreover, the Examiner introduced an additional three references, but stated no reason for using these for his rejections.

On October 15, 2003, the Applicant filed a Communication in response to August 28, 2003 Final Office Action traversing each and every ground of the Examiner's rejections and/or objections, and also arguing against the new references.

On November 14, 2003, the Examiner issued an Advisory Action. In the November 14, 2003 Advisory Action, the Examiner stated that:

> "The [October 15, 2003] proposed amendment will not be entered because it is not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal."

However, the Examiner has failed to respond substantively to the October 15, 2003 Communication. In fact, Applicant did not present any proposed amendment, and has established convincing argument for allowing the claims in this Application. Lacking substantive responses to the October 15, 2003 communication, and also lacking an explanation of the relevance of the new cases introduced in the August 28, 2003 rejection, the Applicant will have difficulty preparing a new appeal brief.

Manual of Patent Examining Procedure (MPEP) §707(f) provides in relevant part:

> "Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it.
>
> If it is the examiner's considered opinion that the asserted advantages are without significance in determining patentability of the rejected claims, he or she should state the reasons for his or her position in the record, preferably in the action following the assertion or argument relative to such advantages. By so doing the applicant will know that the asserted advantages have actually been considered by the examiner and, if appeal is taken, the Board of Patent Appeals and Interferences will also be advised.
>
> The importance of answering such arguments is illustrated by In re Herrmann, 261 F.2d 598, 120 USPQ 182 (CCPA 1958) where the applicant urged that the subject matter claimed produced new and useful results. The court noted that since applicant's statement of advantages was not questioned by the examiner or the Board of Appeals, it was constrained to accept the statement at face value and therefore found certain claims to be allowable. See also In re Soni, 54 F.3d 746, 751, 34 USPQ2d 1684, 1688 (Fed Cir. 1995) (Office failed to rebut applicant's argument)."

Accordingly, Applicant respectfully requests that the Examiner state his reasons for repeating his rejection and/or objections to the claims and respond to Applicant's arguments set forth in the October 15, 2003 Communication.

Applicant respectfully requests the Examiner withdraw the finality of the August 28, 2003 Final Office Action. MPEP §706.07(e) provides that "once a final rejection... has been entered in an application, it should not be withdrawn at the applicant's... request except on a showing under 37 CFR §1.116(b).

37 CFR §1.116(b) provides in relevant part:

> "If amendment touching on the merits of the application... are presented after final rejection... they may be admitted upon a showing of good and sufficient reasons why they are necessary and were not earlier presented."

Since the Examiner did not address the Applicant's arguments traversing the Examiner's objection and/or rejections as required under MPEP §707(f), and Applicant could not present arguments earlier with regard to new material included in the final rejection, Applicant respectfully requests the Examiner withdraw the finality of the August 28, 2003 Final Office Action and respond to Applicant's October 15, 2003 response on the merits.

CONCLUSION

For the above reasons, Applicant respectfully requests that the above remarks be entered and made of record in the present application. An allowance is earnestly requested.

If a telephone interview would be of assistance in advancing prosecution of the subject application, Applicant's undersigned attorney invites the Examiner to telephone at the number provided below.

No fee is deemed necessary in connection with the filing of this Communication. However, if any additional fee is required, authorization is hereby given to charge the amount of any such fee to Deposit Account No. 50-1891.

Respectfully submitted,

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